A **SS LEGEND NAUTILUS (M) SDN BHD**

**v.**

**HAMZAH MOHD GHAUTH & ORS**

B HIGH COURT MALAYA, SHAH ALAM
SURAYA OTHMAN J
[SUIT NO: 21-93-2008]
15 JANUARY 2013

C ***CUSTOMS AND EXCISE:*** *Seizure - Seizure of goods - Beers - Seizure based on suspected liquor smuggling activities - Whether there was reasonable suspicion that goods smuggled - Whether seizure lawful and legal - Whether further detention of consignment was in accordance to s. 128(3) of Customs Act 1967 - Whether legal ownership or possessory*
D *title to consignment proven*

***EVIDENCE:*** *Adverse inference - Failure to call material witness - Whether adverse inference invoked - Evidence Act 1950, s. 114(g)*

The plaintiff was involved in the business of buying and selling
E duty free goods including beer. The first, second and third defendants were custom officers pursuant to s. 2 of the Customs Act 1967 ('Act 235'). On 10 July 2006, the first defendant seized a consignment of 2,399 cartons of Tiger Beer ('beer consignment') at a warehouse in Port Klang ('the warehouse'). The beer
F consignment were seized based on information received with regard to the smuggling of liquor or alcohol activities. The plaintiff demanded for the release of the beer consignment claiming that it had ownership since it had purchased the beer consignment from SSS Maritime Supplies and Services (M) Sdn Bhd ('SSSM').
G However, the defendants refused alleging that the plaintiff was not the rightful owner since documents showed that SSSM was the consignor, Daslim Marketing Enterprise ('Daslim Ent') the consignee and Hoeberg Trading and Services, Singapore ('Hoeberg Trading, Singapore') was the buyer of the beer consignment. The
H plaintiff then filed this suit claiming, *inter alia*, for a declaration that the seizure and detention of the beer consignment was unlawful and claimed for damages. The plaintiff averred that the first defendant had been wilfully negligent in seizing the beer consignment as no offence had been disclosed or committed under
I Act 235 and the Free Zones Act 1990 ('Act 438'). The defendants contended that there were no shipping documents made under the plaintiff's name which showed that the plaintiff was the owner of the beer consignment. There were two invoices

in respect of the said consignment which showed two different descriptions. In addition to that, it was found that Daslim Ent and Hoeberg Trading, Singapore did not exist at their given addresses. Thus, based on all the discrepancies and inconsistencies, and the inability of the plaintiff to prove ownership, the defendants had reasonable suspicion to suspect that the goods were smuggled goods. The issues to be tried by the court were: (i) whether the seizure of the beer consignment was illegal and unlawful; (ii) whether the continuous and further detention of the beer consignment after the expiration of one month from the date of its seizure without referring the matter to a Magistrate for a decision on the plaintiff's claim as required pursuant to s. 128(3) of Act 235 was wrong in law; and (iii) whether the plaintiff was the rightful or legal owner or had possessory title of the seized beer consignment.

**Held (dismissing plaintiff's claim with costs):**

**(1)** The seizure of the beer consignment, even in a free zone area, was legal and lawful since DW3 had reasonable cause to suspect that smuggling activities (which activities are an offence under Act 235) had occurred. The plaintiff had also failed to adhere to the mandatory s. 42A of Act 438 to obtain permission from the relevant port authority and reg. 21 of the Free Zones Regulations 1991 which section is also mandatory, to declare the beer consignment which are deemed as perishable goods in Form FZ No. 1 immediately to the relevant officer at the free zone. As such, the seizure by DW3 of the beer consignment was proper and in accordance with Act 235. (para 21)

**(2)** There was no prosecution with regards to the seized beer consignment although the plaintiff had made a written claim for the said goods before the expiration of one calendar month from the date of its seizure. The first defendant ought to have referred the plaintiff's claim to the DG Customs who should have directed the senior officer of customs to release the said goods or refer the claim to a Magistrate for a decision. However, the defendants refused to release the said goods to the plaintiff or to refer the plaintiff's claim to a Magistrate for a decision. Such failure by the defendants to refer the plaintiff's claim to a Magistrate tantamount to a breach of the statutory duties pursuant to s. 128(1), (2) and (3) of Act 235. As such, the further detention of the beer

consignment was wrong in law (*Soong Chee Kong v. PP;* refd, *Suntharaju Pachayappan v. Jabatan Kastam Diraja Malaysia;* refd). (paras 27 & 30)

**(3)** The plaintiff must prove legal ownership or possessory title of the seized consignment in order to claim in negligence for loss caused to the plaintiff by reason of loss of or damage to the beer consignment. There were no relevant documents to prove that the plaintiff was the rightful or legal owner or had possessory title to the seized beer consignment. The issue of whether SS Legend had paid SSSM for the beer consignment was not proven. Thus, SS Legend failed to prove that it was the legal owner or had possessory title over the beer consignment *(Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors;* refd, *Kesang Leasing Sdn Bhd v. Dato' Hj Mat Ahmad & Ors;* refd). (paras 36 & 39)

**(4)** PW1 testified that he had made dealings with the representative from Daslim Ent, one Encik Roslan. The plaintiff failed to call Encik Roslan as their witness to verify that the plaintiff was the rightful owner of the seized goods. Therefore, an adverse inference under s. 114(g) of the Evidence Act 1950 should be invoked against the plaintiff for not calling this important and material witness *(Munusamy Vengadasalam v. PP*; refd). (para 41)

**Case(s) referred to:**

*Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors [2003] 1 CLJ 585 CA* ***(refd)***

*Chia Sia Chek v. Ketua Pengarah Kastam, Jabatan Kastam Diraja Malaysia & Ors [2009] 2 CLJ 286 HC* ***(refd)***

*Ho Weng Leong v. Ng Kee Chin [1996] 1 LNS 89 HC* ***(refd)***

*Joseph Thambirajah v. Bank Buruh (M) Bhd [2008] 2 MLJ 773 CA* ***(foll)***

*Kesang Leasing Sdn Bhd v. Dato' Hj Mat Ahmad & Ors [2009] 7 CLJ 509 HC* ***(refd)***

*Ketua Polis Negeri Sembilan & Anor v. Manoharan Dorasamy [2004] 1 CLJ 101 FC* ***(refd)***

*Leigh & Sullivan Ltd v. Aliakmon Shipping Co Ltd, The Aliakmon [1986] 2 All ER 145* ***(foll)***

*Manoharan Dorasamy v. Ketua Polis Ibu Pejabat Kontinjen Polis Seremban, Negeri Sembilan & Anor [2002] 1 CLJ 328 CA* ***(refd)***

*Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC* ***(refd)***

*Ng Kook Kin v. PP [1995] 3 CLJ 905 HC* ***(refd)***

*Soong Chee Kong v. PP [1950] 1 LNS 84 HC* ***(refd)***

*Suntharaju Pachayappan v. Jabatan Kastam Diraja Malaysia [2010] 3 CLJ 865 HC* ***(refd)***

**Legislation referred to**
Customs Act 1967, ss. 2, 114(1), 119, 128(1), (2), (3), (5)
Evidence Act 1950, s. 114(g)
Federal Constitution, art. 13(1)
Free Zones Act 1990, ss. 2, 7, 42A(1)(b), 50
Free Zones Regulations 1991, reg. 21(1), (2)(a)
Government Proceedings Act 1956, ss. 5, 6

*For the plaintiff - JR Ravendren; M/s JR Ravendren & Assocs*
*For the defendants - Norliza Zulkifli (Nurul Izzah Abdul Mutalib with her); State Legal Advisor*

*Reported by Amutha Suppayah*

## JUDGMENT

**Suraya Othman J:**

### Introduction

**[1]** The plaintiff is involved in the business of buying and selling duty free goods including beer and having its place of business at Suite 301, Block A, Jalan 20/27 Damansara Intan, Petaling Jaya, 47300, Selangor.

**[2]** The 1st, 2nd and 3rd defendants are custom officers from the Selangor Customs Department pursuant to s. 2 Customs Act 1967 (Act 235), where the 1st defendant was under the direction, control and supervision of the 3rd defendant at all material times. The 4th defendant is vicariously liable on condition that ss. 5 and 6 of the Government Proceedings Act 1956 (Act 359) is fulfilled.

**[3]** On 10 July 2006, the 1st defendant, a custom officer of the Selangor Customs Department seized a consignment of 2,399 cartons of Tiger Beer ('beer consignment') at the CFS 3 Warehouse, West Port, 42000 Port Klang ('CFS 3 Warehouse'). The beer consignment were seized based on information received with regard to the smuggling of liquor or alcohol activities and upon relevant investigation. The plaintiff demanded for the release of the beer consignment claiming that it had ownership since it had purchased the beer consignment from SSS Maritime Supplies and Services (M) Sdn Bhd ('SSSM'). The defendants refused alleging that the plaintiff is not the rightful owner since documents showed that SSSM is the consignor, Daslim Marketing Enterprise ('Daslim Ent') the consignee and Hoeberg Trading and Services,

Singapore ('Hoeberg Trading, Singapore') is the buyer of the beer consignment. The plaintiff then filed the matter in court claiming, *inter alia*, for a declaration that the seizure and the further detention of the beer consignment after one month from the date of its seizure was illegal and unlawful, special damages for loss of the beer consignment valued at RM93,000, general and exemplary damages, interest and costs.

## The Plaintiff's Case

**[4]** The plaintiff was represented by Mr. J R Ravendren who called two witnesses to testify for the plaintiff: Mr. Romesh Subrayan, ('PW1'), a director in the plaintiff's company and Dato' Karuppiah Muthu, ('PW2'), a managing director of SSSM.

**[5]** The plaintiff claimed that it is the owner of the seized beer consignment since it had ordered and purchased the said goods from SSSM *vide* the purchase order No. 06/SSTP/2006 (P2) and invoice No. 1245 (P3) and had made payment for it to SSSM. On 12 July 2006, the plaintiff's representative, Mr. Romesh Subrayan, came to the 1st defendant's office to claim for the release of the said goods but the 1st defendant failed and/or refused to release the said goods to the plaintiff. Subsequently the plaintiff claimed for the said goods *vide* a letter dated 17 July 2006. As the defendants still failed and refused to release the said goods, on 20 August 2006, Mr. Romesh Subrayan lodged a police report at the Klang police station *vide* report No. 005066/06 in respect to the seizure and detention of the said goods by the 1st defendant.

**[6]** The plaintiff contended that the defendants had failed or refused to release the said goods even after the plaintiff had written several letters for its release dated 3 October 2006, 15 November 2006 and 3 January 2007. The plaintiff submitted that the further detention of the beer consignment by the defendants after the expiration of one calendar month from the date of its seizure without referring the matter to a Magistrate for a decision on its claim is wrongful and as such the seizure and detention are illegal and unlawful. The plaintiff further averred that the 1st defendant had been wilfully negligent in seizing the beer consignment as no offence had been disclosed or committed under the Customs Act 1967 (Act 235) and the Free Zones Act 1990 (Act 438) which allows the 1st defendant to seize the said goods.

As a result of the seizure of the beer consignment by the defendants, the plaintiff had incurred losses valued at RM93,000. The plaintiff thus is claiming for a declaration that the defendants were negligent in seizing the beer consignment without any reasonable cause and a declaration that the defendants' act of further detaining the said consignment after the expiration of one month from the date of seizing them, are illegal and unlawful. The plaintiff is also claiming for general and exemplary damages together with interest and costs.

**The Defendant's Case**

**[7]** The defendants were represented by Senior Federal Counsels, Puan Norliza Zulkifli and Puan Nurul Izzah Abdul Mutalib who called three witnesses to testify for the defendants; Encik Wan Azman bin Wan Ali, ('DW1'), a senior assistant director of Selangor Customs; Dato' Abd Aziz bin Abdul Latif, ('DW2'), the head of department of prevention, operation, investigation and prosecution of Selangor Customs Department and Encik Hamzah bin Mohd Ghauth, ('DW3') who is the 1st defendant and a custom officer in the prevention department of Selangor Customs.

**[8]** The defendants contended that there were no shipping documents made under the plaintiff's name which showed that the plaintiff is the owner of the beer consignment. The defendants' contended that the beer consignment were seized because there was reasonable suspicion for the 1st defendant to do so since there were two invoices in respect of the said consignment which showed two different descriptions; "PVC Compound" and "Tiger Beer". Apart from that, the status of the freight discloses as 'IMPORT' and not 'TRANSHIP'.

**[9]** Further, the freight of the beer consignment was not in accordance to normal business practice because it would be more economical for the said consignment to be sent to Singapore from the port in Johor and not to be returned to Port Klang which would involved a higher cost. Added to that, Daslim Ent, the consignee of the beer consignment does not exist at the address as stated in the records of the Companies Commission of Malaysia ("CCM") but instead the address as appearing in the records of CCM belongs to a private residential home, where the owner of the said home had confirmed that his premise is not Daslim Ent.

**[10]** DW1 also discovered that the party, which according to the shipping document is the purported buyer, that is, Hoeberg Trading, Singapore does not exist at the place in accordance to the information from the Accounting and Corporate Regulatory Authority, Singapore.

**[11]** The visit by DW3 himself to Hoeberg Trading premises in Singapore showed that Hoeberg Trading does not exist and Hoeberg Trading too had never made any claim for the beer consignment. Thus based on all these discrepancies and inconsistencies, and the inability of the plaintiff to prove ownership, the defendant has reasonable suspicion to suspect that the goods were smuggled goods. Thus when DW3 seized and detained the beer consignment and not release them to the plaintiff, DW3's action in doing so are well within the statutory powers given to him under the law.

**[12]** *Issues To Be Tried By The Court*

1. Whether the seizure of the beer consignment was illegal and unlawful.
2. Whether the further detention of the beer consignment after the expiration of one month from the date of its seizure without referring the matter to a Magistrate for a decision on the plaintiff's claim was wrong in law.
3. Whether the plaintiff was the rightful or legal owner or has possessory title of the seized beer consignment.

## Findings Of The Court

**[13]** It is not disputed that the 1st defendant, Encik Hamzah bin Mohd Ghauth, (DW3) seized the said goods at the CFS 3 Warehouse based on suspicion and after some investigation. The principal question to be determined here is whether the defendants had complied with the relevant laws and regulations in performing their duties. There is also the issue on the continuous or further detention of the beer consignment after one month from the date of its seizure without referring the matter to a Magistrate for his decision on the plaintiff's claim. The claim against the defendants, however, is also subjected to the issue of whether the

plaintiff was the rightful or legal owner or has possessory title of the seized beer consignment. Thus on these premises, the three principal issues to be determined are as follows:

1) Whether the seizure of the beer consignment was illegal and unlawful.

2) Whether the continuous and further detention of the beer consignment after the expiration of one month from the date of its seizure without referring the matter to a Magistrate for a decision on the plaintiff's claim was wrong in law.

3) Whether the plaintiff was the rightful or legal owner or has possessory title of the seized beer consignment.

*Whether The Seizure Of The Beer Consignment Was Illegal And Unlawful*

**[14]** It is the plaintiff's submission that the 1st defendant, Encik Hamzah Mohd Ghauth (DW3) was wilfully negligent in seizing the beer consignment in a free zone area without any reasonable or probable cause as no offence had been disclosed or committed under the Customs Act 1967 (Act 235) and the Free Zones Act 1990 (Act 438). The fact that the warehouse from where the beer consignment were seized is located in the free zone area was not denied by defendants. Based on the First Schedule to the Free Zones Act 1990, Westport is located in a free zone area. Therefore it is the plaintiff's submission that no offence had been disclosed or had been committed under the Customs Act 1967 as the said goods were still in a free zone area. This is so as accordance to s. 7 of the Free Zones Act 1990, the said goods had not been imported into Malaysia and thus no import duty or taxes need to be paid in accordance with s. 4 of the same Act.

**[15]** Mr. J R Ravendren, solicitor for the plaintiff further argued that according to the notice of seizure dated 10 July 2006, Encik Hamzah Mohd Ghauth, (DW3), had seized the beer consignment pursuant to s. 114 of the Customs Act 1967, as according to him, (DW3), there was a reasonable cause to believe or suspect that an offence under the Customs Act 1967 had been committed. As the beer consignment was located in the free zone area, it is the plaintiff's submission that there is no reasonable cause to suspect an offence or breach of regulations under the Customs Act 1967 had been committed.

**[16]** To this argument, Puan Norliza Zulkifli, Senior Federal Counsel for the defendants submitted that Encik Hamzah Mohd Ghauth, (DW3), had testified that on 10 July 2006, based on information he received with regard to the smuggling of liquor or alcohol activities, he and his team had gone to Westport Klang to investigate. On arrival at Allied Warehouse, he discovered some suspicious looking goods, that is, these goods were wrapped with black plastic wrappers without any markings on them. Upon checking, the goods were discovered to be cartons of Tiger Beer which were taken out from container No: AVLU2011552. However, Encik Hamzah Mohd Ghauth could not get any information or any satisfying answers on the ownership of the cartons of Tiger Beer from Allied Warehouse. The only information he had on the ownership was a request form, (D24), which stated Allied Warehouse as the agent or line operator and the name of the vessel in which the goods were brought in. DW3 subsequently issued a seizure notice, (P8), for the beer consignment. DW3 made further investigations with the Westport authority to find out who was the shipping agent for the seized beer consignment and the information he received was that it was one TS Distripark Center Sdn Bhd.

**[17]** Encik Hamzah Mohd Ghauth then went to TS Distripark Center Sdn Bhd at its address at No. 38, Lorong Cempening, Port Klang, for further investigations. During his course of investigations, Encik Hamzah Mohd Ghauth obtained a few documents namely, Delivery Order (D5), Bill of Lading (ID-5(a)), Delivery Order (in p. 21 of Common Bundle of Documents 1 ("CBD 1") which showed that the beer consignment was stated as "PVC compounds" with the same vessel number and the same date as in document ID16. However the consignment in ID16 was stated as beer. It is therefore submitted by defendant's counsel, Puan Norliza Zulkifli that based on this discrepancies and inconsistencies, Encik Hamzah Mohd Ghauth had reasonable suspicion of smuggling activities and that he had acted lawfully in seizing and detaining the said beer consignment as allowed under s. 114 of the Customs Act 1967.

Section 114 of the Customs Act 1967 states:

> All goods in respect of which here has been, or there is, reasonable cause to suspect that there has been committed any offence against this Act or any regulations made thereunder, or any breach of any of the provisions of this Act or any regulation

made thereunder or any restriction or condition subject to or upon which any license or permit has been granted, together with any receptacle, package, conveyance, vessel not exceeding two hundred tons nett registered tonnage or aircraft other than an aircraft engaged in international carriage, in which the same may have been found or which has been used in connection with such offence or breach and any books or documents which may reasonably be believed to have a bearing on the case, may be seized by any officer of customs in any place either on land or in territorial waters.

**[18]** In deciding this issue, the point to note is that based on information received on liquor and alcohol smuggling activities, Encik Hamzah Mohd Ghauth, DW3 went to Allied Warehouse to investigate and having sighted the unmarked cartons wrapped in black plastic bags and subsequently checking the documents which showed two different descriptions of the consignment, he has reasonable cause to suspect that there were ongoing smuggling activities. Upon further investigation and with the assistance of Encik Wan Azman bin Wan Ali, DW1, he discovered that the beer consignment did not have the relevant permission from the port authority as required under s. 42A of Free Zones Act.

Section 42A of the Free Zones Act 1990 states:

**42A. Movement of goods into and from a free zone by sea**

(1) No goods shall be brought into, or be loaded or water-borne to be loaded to be taken out from any free zone by sea:

(a) Except at a landing place; and

(b) Until permission to do so has been received from the proper officer of the authority.

(2) Except with the permission of the proper officer of the authority, no such goods, after having been landed or unshipped, shall be transhipped.

**[19]** A related issue raised by the plaintiff, Mr JR Ravendren, concerns the jurisdiction where the beer consignment were seized. The contention by Mr JR Ravendren is that the beer consignment were seized within the free zone area which is deemed to be a place outside Malaysia. This is so as according to ss. 2 and 50 and item 5 of Schedule 1 of the Free Zones Act 1990, a free zone area is a place outside Malaysia and that being so, there is

no levy imposed within this zone. Mr JR Ravendren argued that under reg. 21 of the Free Zones Regulations 1991, it states that a person has one month after entering the port to declare their goods to the port authority and as such there was no offence committed when the beer consignment were seized by Encik Hamzah Mohd Ghauth.

**[20]** Having read the relevant provisions of the law, I disagree with learned counsel for the plaintiff. The purpose for the establishment of free zones are clearly set out in the long title to the Free Zones Act - "An Act to provide for the establishment of free zones in Malaysia for promoting the economic life of the country and for related purposes". As part of the efforts towards promoting economic life, s. 4 of the Act provides that except for those specifically and absolutely prohibited by law, goods or services of any description may be brought into, produced, manufactured or provided in a free zone without payment of any customs duty, excise duty, sales tax or service tax. Where the goods fulfilled the conditions set under the Act, the goods are exempted from these payments. However, s. 42A(1)(b) of the same Act clearly states that it is mandatory for any movement of goods into or from the free zones to obtain permission from the relevant port authority. Further, as regard to reg. 21 of the Free Zones Regulations 1991, reg. 21(1) and (2)(a) state that in the case of perishable goods, a declaration as in Form FZ No. 1 and any document relating to the goods as the proper officer of the authority may require shall be submitted forthwith. In this present case, it is obvious that beer is a perishable good; hence the declaration must be made immediately (forthwith). Regulation 21 of the Free Zones Regulations 1991 states:

**Goods entering free zones from outside Malaysia**

21(1) Any person who brings in any goods from outside Malaysia into a free zone, he or his agent shall submit to a proper officer of the authority at the zone -

(a) A declaration as in Form FZ No. 1 as specified in the First Schedule; and

(b) Any document relating to the goods as the proper officer of the authority may require.

(2) The declaration and document referred to in paragraph (a) and (b) above shall be submitted -

(a) in the case of perishable goods, forthwith:

(b) in the case of inflammable goods, within 14 days; and

(c) in the case of any other goods, within 1 month.

from the date the goods were brought into the free zone.

**[21]** Based on the above reasons, I am of the opinion that the seizure of the beer consignment, even in a free zone area, was legal and lawful. This is so since from the circumstances of the case, DW3 had reasonable cause to suspect that smuggling activities (which activities are an offence under the Customs Act) had occurred. Apart from that, the plaintiff had also failed to adhere to the mandatory s. 42A of the Free Zones Act 1990 to obtain permission from the relevant port authority and reg. 21 of the Free Zones Regulations 1991 which section is also mandatory, to declare the beer consignment which are deemed as perishable goods in Form FZ No. 1 immediately to the relevant officer at the free zone. As such the seizure by DW3 of the beer consignment is proper and is in accordance with s. 114 Customs Act. Thus the answer to the first issue is in the negative.

*Whether The Continuous And Further Detention Of The Beer Consignment After The Expiration Of One Month From The Date Of Its Seizure Without Referring The Matter To A Magistrate For A Decision On The Plaintiff's Claim Was Wrong In Law*

**[22]** The plaintiff submitted that although the 1st defendant had seized the said goods pursuant to s. 114(1) of the Customs Act 1967, the 1st defendant, (DW3), had failed and/or refused to release the said goods to the plaintiff or to refer the plaintiff's claim to a Magistrate for a decision as required pursuant to s. 128(3) of the same Act.

**[23]** The plaintiff submitted that based on a true interpretation of s. 128 of the Customs Act 1967, where there is no prosecution, as in this case, and the plaintiff having made a written claim for the said goods on 17 July 2006, within one calendar month from the date of the seizure, then the 1st defendant ought to have referred the claim to the Director General of Customs ("DG Customs") who should have directed the senior officer of customs to release the said goods or refer the claim to a Magistrate for a decision. To the contrary, the defendants until now had failed and refused to release the said goods to the plaintiff or to refer the plaintiff's claim to a Magistrate for a decision. It is the plaintiff's

submission that the further detention of the said goods after the expiration of one calendar month from the date of its seizure without referring the plaintiff's claim to the Magistrate makes the seizure of the said goods unlawful.

**[24]** Mr JR Ravendren referred to the following cases to support his argument: *Soong Chee Kong v. PP* [1950] 1 LNS 84; [1951] 17 MLJ 5; *Chia Sia Chek v. Ketua Pengarah Kastam, Jabatan Kastam Diraja Malaysia & Ors* [2009] 2 CLJ 286; [2009] 6 AMR 149; *Sunthararaju Pachayappan v. Jabatan Kastam Diraja Malaysia* [2010] 3 CLJ 865; *Manoharan Dorasamy v. Ketua Polis Ibu Pejabat Kontinjen Polis Seremban, Negeri Sembilan & Anor* [2002] 1 CLJ 328; [2002] 1 MLJ 328; and *Ketua Polis Negeri Sembilan & Anor v. Manoharan Dorasamy* [2004] 1 CLJ 101.

**[25]** Learned Senior Federal Counsel for the defendants, Puan Norliza Zulkifli who was assisted by Puan Nurul Izzah Abdul Mutalib submitted that the word "may direct" in s. 128(3) means the DG Customs can release such seized goods or can direct the matter to be referred to a Magistrate. She submitted that the intention of Parliament is clear; that is, the word used is "may" and not "shall", hence the DG Customs has the discretion to either direct the goods to be released or to be referred to a Magistrate for a decision. In this light, the Puan Norliza Zulkifli submitted the cases of *Ho Weng Leong v. Ng Kee Chin* [1996] 1 LNS 89; [1996] 5 MLJ 139 and *Ng Kook Kin v. PP* [1995] 3 CLJ 905; [1995] 2 MLJ 35 to support her contention.

**[26]** It is correct that the applicable law pertaining to this issue is s. 128 of the Customs Act 1967. Section 128 states:

> (1) If there be no prosecution with regard to any goods seized under this Act, such goods or the proceeds of sale of such goods are held pursuant to paragraph (c) of subsection (1) of section 115 shall be taken and deemed to be forfeited at the expiration of one calendar month from the date of seizure of the goods unless, before such expiration -
>
> (a) a claim to such goods or the proceeds of sale of such goods is made under subsection (2);
>
> (b) a written application is made for the return of such goods under paragraph (a) and (b) of subsection (1) of section 115; or

(c) such goods are returned under the said paragraph (a) or (b). A

(2) Any person asserting that he is the owner of such goods or the proceeds of sale of such good, as the case may be, and that they are not liable to forfeiture may give written notice to a senior officer of customs that he claims the same. B

(3) On the expiration of the period mentioned in subsection (1), or, if a decision is made earlier that there be no prosecution with regards to the goods, on the making of the decision the senior officer of customs shall, if such goods or the proceeds of sale of such goods are not taken and deemed to be forfeited under that subsection, refer the claim to the Director General who may direct that such goods or the proceeds of sale of such goods or the security furnished under the paragraph (a) or (b) of subsection (1) of 115, as the case may be, released or may direct such senior officer of customs, by information in the prescribed form, to refer the matter to the Magistrate of the first class for his decision. C D

(4) The Magistrate of the first class shall issue a summons requiring the person asserting that he is the owner of the goods, and the person from whom the goods were seized, to appear before him, and upon their appearance or default to appear, due service of such summons being proved, the Magistrate of the first class shall proceed to examination of the matter and upon proof that an offence against this Act has been committed and such goods were the subject matter, or were used in the commission of such offence, shall order such goods or the proceeds of sale of such goods or the amount secured under the paragraph (a) or (b) of subsection (1) of section 115 as the case may be to be forfeited, or in the absence of such proof, may order the release of such goods or the proceeds of sale of such goods or the security furnished under the paragraph (a) or (b) of subsection (1) of section 115, as the case may be. E F G

(5) In any proceedings under subsection (4), section 119 shall apply to the person asserting that he is the owner of the goods and to the person from whom the goods were seized as if such owner or person had been the defendant in a prosecution under this Act. H

**[27]** From the facts of the case it is evident that there was no prosecution with regards to the seized beer consignment. The plaintiff had also made a written claim for the said goods through its letter dated 17 July 2006 before the expiration of one calendar month from the date of its seizure which is on 10 July 2006, (P8). I

As such, in those circumstances, the 1st defendant, (DW3), ought to have referred the plaintiff's claim to the DG Customs who should have directed the senior officer of customs to release the said goods or refer the claim to a Magistrate for a decision. However, in this present case the defendants had failed and refused to release the said goods to the plaintiff or to refer the plaintiff's claim to a Magistrate for a decision.

**[28]** In the case of *Soong Chee Kong v. PP* [1950] 1 LNS 84; [1951] 17 MLJ 5 the court held that:

> Section 108 (predecessor to section the present 128) provides that when any goods are seized, notice shall forthwith be given to the owner, unless he or his agent knows about it already. If there be no prosecution, or if there is a prosecution but the magistrate does not forfeit and if the goods are not claimed within one month, then they are forfeited automatically by operation of law ... Where a claim is made it must be considered by the comptroller who may release the goods but cannot forfeit them ... If he does not release, he must refer the matter to court. The court must order their forfeiture if the goods are proved to be subject matter or were used in the commission of a custom offence; otherwise the court will decree their release.

**[29]** Mohd Sofian Abd Razak J in the case of *Sunthararaju Pachayappan v. Jabatan Kastam Diraja Malaysia* [2010] 3 CLJ 865 held that:

> The defendant had failed to comply with the provision of s. 128(3) of the Act. Pursuant to s. 128(3) the Act Director General of Customs has to make a decision whether to release the seized goods or direct such senior officer of customs to refer the matter to the magistrate for his decision. The decision to refer the matter to the magistrate must be made within the one (1) calendar month from the date of receipt of the notice of claimant.

**[30]** After perusing the relevant provisions of the law, the cited cases above and the material facts in this present case, I agree with learned counsel for the plaintiff, Mr JR Rajendren that under s. 128(2) Customs Act 1967, where a person has asserted that he is the owner of such goods, he only needs to make a written claim before the expiration of one calendar month from the date of seizure of the goods. From the facts, the plaintiff had written a letter dated 17 July 2006 (P9) to the 1st defendant and DW1 had also admitted acknowledging receipt of the said letter asserting the plaintiff's claim to the seized goods. Further DW2 also admitted that the plaintiff had also written subsequent letters

dated 3 October 2006, 15 November 2006 and 3 January 2007 reiterating its claim and asking for the release of the said goods. Thus upon the expiration of one calendar month from the date of seizure, 10 July 2006, the defendants who had received the letter dated 17 July 2006 should have either released the said goods or refer the plaintiff's claim to a Magistrate for a decision. Such failure by the defendants to refer the plaintiff's claim to a Magistrate tantamount to a breach of the statutory duties pursuant to s. 128(1), (2) and (3) Customs Act 1967. As such based on the above reasons, the further detention of the beer consignment after one month from the date of its seizure without referring the matter to a Magistrate for a decision on the plaintiff's claim was wrong in law. Thus the answer to the second issue is in the affirmative.

*Whether The Plaintiff Was The Rightful Or Legal Owner Or Has Possessory Title Of The Seized Beer Consignment*

**[31]** Mr JR Ravendren submitted that based on s. 2 of the Customs Act 1967, "owner" means "any person being or holding himself out to be the owner, importer, exporter, consignee, agent or person in possession of, or beneficially interested in, or having any control of, or power of disposition over the goods". In this case, since the plaintiff had paid SSSM for the said goods, the plaintiff has a beneficial interest over the said goods. The plaintiff had proven that it had ordered and purchased the said goods *vide* purchase order P2. The plaintiff had also made payments *vide* Maybank cash cheque, P3 for the said goods, thus the plaintiff had acquired the proprietary rights over the said goods. Further, Dato' Karuppiah Muthu, the managing director of SSSM, PW2, on behalf of SSSM had testified and confirmed selling the said goods to the plaintiff *vide* exh. P15 (invoice No. 1245). Mr JR Ravendren argued that the 1st defendant, Encik Hamzah Mohd Ghauth, DW3, agreed with him that he, DW3, had not taken any steps to verify the facts as stated in the plaintiff's letter dated 17 July 2006.

**[32]** Mr JR Ravendren further submitted that both Encik Wan Azman Wan Ali, a senior assistant director of Selangor Customs, DW1, and Encik Hamzah Mohd Ghauth, DW3, had admitted during the trial that there were no other claimant apart from the plaintiff who had asserted a claim for the seized goods, meaning that the plaintiff was holding himself out to be the owner. He

A then referred to s. 128(5) of the Customs Act 1967, and argued that in an enquiry, the burden of proof is on the plaintiff to prove that customs duties or taxes or the said goods were lawfully imported pursuant to s. 119 of the Customs Act 1967.

B **[33]** Mr JR Ravendren further argued that in the context of customs law, there is no burden imposed on the plaintiff to prove proprietary right since if that was so, then the meaning of the word "owner" as defined under s. 2 of the Customs Act 1967 would not had included an "agent" who is also deemed as an C "owner". As the plaintiff had produced P2, P3 and P15, all these documents confirmed the plaintiff to be the party entitled to claim the said goods.

**[34]** The plaintiff finally argued that the further detention of the said goods by the defendants had violated art. 13(1) of the D Federal Constitution, where it states "No person shall be deprived of property save in accordance with law". In this regard, Mr JR Ravendren referred to the principles applied in the case of *Manoharan Dorasamy v. Ketua Polis Ibu Pejabat Kontinjen Polis Seremban, Negeri Sembilan & Anor* [2002] 1 CLJ 328; [2002] E 1 MLJ 328 and *Ketua Polis Negeri Sembilan & Anor v. Manoharan Dorasamy* [2004] 1 CLJ 101 to support his argument.

**[35]** On the other hand, Senior Federal Counsel for the defendants, Puan Norliza Zulkifli submitted that the plaintiff had F failed to prove that they are the rightful owner of the seized consignment either through the testimonies of their witnesses or through the documents tendered in court, citing the case of *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors* [2003] 1 CLJ 585; [2003] 1 MLJ 567 and *Kesang Leasing Sdn Bhd v.* G *Dato' Hj Mat Ahmad & Ors* [2009] 7 CLJ 509; [2009] 2 MLJ 574 to support her contention.

**[36]** After considering both the submissions of counsels, I am of the view that the plaintiff must prove legal ownership or possessory H title of the seized consignment in order to claim in negligence for loss caused to the plaintiff by reason of loss of or damage to the property (beer consignment). As regard to the principle of legal ownership or possessory title, I am guided by the case of *Leigh & Sullivan Ltd v. Aliakmon Shipping Co Ltd, The Aliakmon* [1986] 2 I All ER 145. This case concerns a c&f cargo that was damaged during a voyage but without the knowledge of the buyer and

seller. The buyer was unable to pay when the bill of lading was tendered resulting in a new contract between the seller and buyer under which the buyer was to take delivery of the cargo as agent for the seller and the buyer after taking delivery was to store them to the order of the seller. It was afterwards that the damage was discovered and the buyer brought as action against the ship-owner claiming for damages for breach of contract and negligence. The case went up to the House of Lords where it was held:

(1) Applying the principle that a person could not claim in negligence for loss caused to him by reason of loss of or damage to property unless he had either legal ownership or a possessory title to the property at the time when the loss or damage occurred, the buyer of shipped goods who had not become the holder of the bill of lading but who had, under the terms of a cif or c&f contract with then buyer, assumed the risk of damage to the goods was prevented by his lack of legal ownership or possessory title from suing the shipowner for negligence for damage occurring to the goods in the course of carriage. The fact that a buyer under a cif or c&f contact was the prospective legal owner of them made no difference to his inability to sue in respect of damage caused prior to his becoming owner (see p 147 g h, p 149 4 f, p 151 a b and p 158 a to c, post); *Margarine Union Gambh v. Cambay Prince Steamship Co Ltd, The Wear Breeze* [1967] 3 All ER 775 approved.

(2) The buyers could not claim as equitable owners of the goods because it was doubtful whether equitable interests in goods could be created or exist within the confines of an ordinary contract of sale. In any event an equitable owner of goods who did not also have possessory title to them was not entitled by himself, and without the legal owner being made a party, to sue in negligence a person who by want of care caused loss of or damage to the goods (see p 147 g h, p 151 e f and p 158 a to c, post).

(3) There was no policy reasons why, in the case of a cif or c&f buyer of goods to whom the risk but not the title had passed, an exception should be made to the general rule that only the legal owner or person having possessory title to goods could sue in negligence for damage to them. Furthermore, there was no principle of transferred loss in English law and no reason to introduce such a principle because there was no *lacuna* in the law, since in the case of an ordinary cif and c&f contract s. 1 of the Bills of Lading

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> Act 1855 entitled the buyer to sue the shipowner on the contract in the bill of lading for loss of or damage to the goods once the bill of lading was indorsed over to the buyer by the seller ...

B **[37]** In the case of *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors* [2003] 1 CLJ 585; [2003] 1 MLJ 567, Gopal Sri Ram, Richard Malanjum and Mohd Ghazali JJCA, (as they then were) referred and followed the case of *The Aliakmon* [1986] 2 All ER 145:

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> ... in order to enable a person to claim in negligence for loss caused to him by reason of loss of or damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred, and it is not enough for him to have only had contractual rights in relation to such property which have been adversely affected by the loss of or damage to it.

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**[38]** In the case of *Kesang Leasing Sdn Bhd v. Dato' Hj Ahmad & Ors* [2009] 7 CLJ 509; [2009] 2 MLJ 574, Mohd Hishamudin J (as he then was) held:

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> There were no documents of title tendered to show that the plaintiff was at the material time the registered owner of the apartments. One could not be deprived of a property which one never had in the first place. By failing to tender the evidence of the strata titles pertaining to the apartments, the plaintiff had failed to show that it was at the material time, the owner of the apartments. There was also no evidence tendered to prove that Tanjung Tuan resort Development was the registered owner of the two apartments. One cannot legally sell something that one does not legally own unless as an agent on behalf of the principal/ legal owner, which was not the case here.

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**[39]** Reverting back to the case at hand; it is clear that all transactions showed that the parties to it (the buying and selling transaction) were SSSM, Daslim Ent and Hoeberg Trading, Singapore. There are no relevant documents to prove that the plaintiff is the rightful or legal owner or has possessory title to the seized beer consignment. In addition, the plaintiff only came into the picture after the goods were seized. Even the documents P2, P3 and P15, tendered by the plaintiff failed to show that SS Legends (plaintiff) is the rightful owner. P2, the purchase order from the plaintiff to SSSM showed Daslim Ent as the forwarding

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agent and Hoeberg Trading, Singapore as the consignee. P15, the invoice showed that the goods were sold to SS Legend by a Maybank cash cheque No. NR 694069 but the cash cheque was never tendered in court. What was tendered instead is SS Legend's bank statement which showed that the amount of RM87,600 was withdrawn by a cash cheque No. 694069; but to whom the payment was made to, was not disclosed. As such the issue of whether SS Legend had paid SSSM for the beer consignment is not proven. Thus SS Legend failed to prove that it is the legal owner or has possessory title over the beer consignment.

**[40]** I am also in agreement with Puan Norliza Zulkifli that there are too many inconsistencies and discrepancies found on the documents tendered by the plaintiff. The bill of lading, vessel booking confirmation, (ID-5(a) and (b)) showed Daslim Ent as consignee. The booking letter from Summit Harvest (PG) Sdn Bhd dated 7 July 2006, (ID7), showed 'Daslim Ent/SS Legends' and not just SS Legends, which still does not prove legal ownership. Therefore, weight should not be given to these documents which failed to show the plaintiff as the rightful and legal owner of the seized consignment. In fact what the purported documents showed is that the plaintiff was never a party to the transaction of the seized consignment. These documents too are marked as ID in the trial for identification purpose and not as exhibits since the plaintiff had failed to call the maker to testify to its authenticity or admissibility. It is trite law that documents marked as "ID" do not form part of the court's records and cannot be admitted into evidence. Support for this principle is found in the case of *Joseph Thambirajah v. Bank Buruh (M) Bhd* [2008] 2 MLJ 773. In this case, the Court of Appeal held:

> We are of the view that the third letter of demand cannot be considered at all because it was not tendered in court by any witness of respondent. It was only an identification document ('ID') in the non-agreed bundle and was never converted to a court exhibit.

**[41]** It is also pertinent to note that Mr. Romesh Subrayan, PW1, had testified that he had made dealings with the representative from Daslim Ent, one Encik Roslan whom he claimed was with him to see DW3 and yet on cross-examination,

he does not even know the whereabouts of Encik Roslan. The plaintiff had failed to call Encik Roslan as their witness to verify that SS Legend (plaintiff) is the rightful owner of the seized goods. Therefore, in such circumstances, an adverse inference under s. 114(g) of the Evidence Act 1950 (Act 56) should be invoked against the plaintiff for not calling this important and material witness. As stated in the case of *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492, the Supreme Court held:

> It is essential to appreciate the scope of section 114(g) of the Evidence Act, 1950 lest it be carried too far outside its limit. Adverse inference can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but a material document by a party in his possession nor for non-production of just any witness but only an important and material to the case.

**[42]** In addition, PW1 does not even know the director of Daslim Ent and the registered address of Daslim Ent. PW1 testified that payment was not made to Daslim Ent for being their purported forwarding agent. Further, relevant investigations by DW1 and DW3 showed that the registered address of Daslim Ent as shown in the Registrar of Companies' (ROC) search, (D26) was not a place of business. DW3 had gone to the registered address as stated in D26 and discovered it to be a residential house and the owner, a Chinese man, had informed DW3 that he had bought the house through a public auction in 2005 as shown in the proclamation of sale (D27). DW1 also, in the course of investigation, went to Singapore to Hoeberg Trading but found instead the premise to be vacant. DW3 went to the Accounting and Corporate Regulatory Authority, Singapore and discovered that the company does not exist. Thus based on his investigation, DW3 concluded that Daslim Ent and Hoeberg Trading, Singapore are fictitious companies which do not exist.

**[43]** Other than that, the facts revealed that the surrounding transactions were very suspicious. Dato' Karuppiah Muthu, PW2, a director of SSSM, when referred to the Registrar of Societies's (ROS) search on SS Legend (D17) which disclosed that Encik Romesh Subrayan, PW1, is also a director of SSSM, admitted that this was true, that the two companies, SSSM and SS Legend (plaintiff) are closely linked with PW1 being a director in both the companies.

**[44]** Also, as submitted by Puan Norliza Zulkifli, if the seized goods are for transhipment in Port Klang and to be sold to Hoeberg Trading in Singapore, it is not logical for the seized consignment to be purchased from Pasir Gudang Port, Johor then transhipped to Port Klang, then re-sold in Singapore. This is not in accordance with normal business practice because it would be more economical for the said consignment to be sent to Singapore from Pasir Gudang Port in Johor and not to be returned to Port Klang which would involved a higher cost.

**[45]** Therefore based on the reasons above, the plaintiff has failed to prove that they are the rightful or legal owner or has possessory title of the seized beer consignment. As such the answer to the third issue is in the negative.

## Conclusion

**[46]** Having therefore given due and serious consideration to the submissions and authorities of both learned counsels and in particular the oral and written evidence adduced, I find that the plaintiff has not proved that it is the rightful or legal owner or has possessory title of the seized beer consignment. Thus without the rights of ownership or property being vested in the plaintiff as owners of the seized beer consignment, the plaintiff would not be entitled to bring or succeed in its action framed in tort against the defendants. Accordingly, I dismiss the plaintiff's claim.

## Costs

**[47]** Puan Norliza Zulkifli prayed for RM15,000 as costs and Mr JR Ravendren prayed for RM5,000. In the circumstances, I feel RM15,000 is fair and I therefore ordered this amount to be paid by the plaintiff to the defendants.

The plaintiff's claim dismissed with costs RM15,000.